Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Stale or Moot Docketed Proceedings	)	
	)	
1993 Annual Access Tariff Filings	)	CC Docket No. 93-193
Phase I	)	
	)	
1994 Annual Access Tariff Filings	)	CC Docket No. 94-65
	)	
AT&T Communications Tariff F.C.C. Nos. 1	)	CC Docket No. 93-193
and 2, Transmittal Nos. 5460, 5461, 5462,	)	
and 5464	)	
Phase II	)	
	)	
Bell Atlantic Telephone Companies Tariff	)	CC Docket No. 94-157
F.C.C. No. 1, Transmittal No. 690	)	
	)	
NYNEX Telephone Companies Tariff	)	
F.C.C No. 1, Transmittal No. 328	)	

REPLY IN SUPPORT OF PETITION FOR RECONSIDERATION

MICHAEL E. GLOVER
EDWARD SHAKIN
OF COUNSEL

MARK L. EVANS
EUGENE M. PAIGE
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, NW
Suite 400
Washington, D.C. 20036

JOSEPH DIBELLA
VERIZON
1515 North Courthouse Road
Suite 500
Arlington, Virginia 22201

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WorldCom and AT&T failed to seek reconsideration or judicial review of the *Termination Order* within the time limits prescribed by statute. Without any effort to justify their dereliction, they nevertheless now claim, more than 14 months after the fact, that the *Termination Order* was without legal effect and that the Bureau's *Reinstatement Order*, though issued long after the *Termination Order* had become final and non-appealable, was nonetheless "a routine and appropriate exercise" of the Bureau's "error-correction" authority. Opposition of WorldCom, Inc. and AT&T Corp. to Verizon's Petition for Reconsideration ("Opp.") at 3. The theories offered up in support of these assertions have no support in the statute, no foundation in the governing judicial precedents, and no basis in logic. On the contrary, as Verizon demonstrated in its Petition for Reconsideration, the *Reinstatement Order* must be set aside because neither the Bureau nor the Commission itself has authority to undo, at this late date, the Commission's final and non-appealable termination, in January 2002, of the § 204 rate investigations consolidated in CC Docket No. 94-157.

ARGUMENT

No one disputes the Commission's authority, subject to applicable statutory constraints, to correct an order containing a typographical or transcription error. Nor is there any doubt that the Commission may correct its own *substantive* error if it acts while the case remains alive — that is, before the period for reconsideration or judicial review has expired, or during the pendency of a timely petition for reconsideration or judicial review. But that is not this case. At issue here is an effort by the Bureau to correct an alleged substantive error — reflecting an exercise of judgment or discretion by the Commission that the Bureau now believes was

mistaken — more than a year after the alleged error was committed and some 11 months after the order at issue became final and non-appealable.[1]

According to WorldCom and AT&T, the distinction is beside the point. The Commission, they claim, has "inherent power" to correct its own mistakes "at any time," regardless of whether they involve a mere slip of the pen without substantive significance or instead embody a mistaken judgment that directly affects a party's substantive rights. Opp. at 3. In their view, the Commission's "error-correction authority" knows no bounds. Under the logic of their analysis, the Commission is free to reinstate a mistakenly terminated § 204 investigation — or, for that matter, to correct *any* perceived error in *any* order — 5, 10, 25, or even 50 years after the supposedly mistaken order became final and non-appealable. That view is utterly incompatible with the statute and the applicable case law and must be rejected.

A. The Termination of CC Docket No. 94-157 Embodied a Substantive Determination That, Whether Correct or Incorrect, the Commission Could Not Lawfully Nullify Once the *Termination Order* Became Final And Non-Appealable

1. The case law makes clear that, subject to pertinent statutory limitations, the Commission may correct an erroneous order on its own motion if it acts "within the period for taking an appeal." *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950); *see also American Methyl Corp. v. EPA*, 749 F.2d 826, 835 (D.C. Cir. 1984) ("within the period available for taking an appeal"); *Spanish Int'l Broad. Co. v. FCC*, 385 F.2d 615, 621 (D.C. Cir. 1967) ("within the period rehearing may be sought or an appeal may be noted"). The point of this rule is plain enough: until an order becomes final and non-appealable, the Commission retains jurisdiction

[1] As SBC has correctly explained, it is by no means clear that the inclusion of CC Docket No. 94-157 in the list of proceedings terminated was in fact an error, for the proceeding was undeniably "stale" by the time of the *Termination Order*. Reply Comments of SBC Communications, Inc. in Support of Verizon's Petition for Reconsideration ("SBC Reply") at 2-3.

over the proceeding and may in appropriate circumstances correct any error it uncovers. Once the time for reconsideration and judicial review has expired, by contrast, any affected party may rely on an order's finality in making its business decisions without fear that the Commission may subsequently nullify the order and retroactively alter its legal effect.

WorldCom and AT&T say not a word about the *Albertson* rule. Instead, they attack a straw man, pointing to the D.C. Circuit's order in *AT&T Corp. v. FCC*, No. 02-1084 (July 5, 2002) (per curiam), as proof that the Commission may "reinstate a docket terminated inadvertently after the time for *reconsideration* ha[s] passed." Opp. at 13 (emphasis added). As their own description of that ruling plainly reveals, however, the termination at issue there — adopted in the same *Termination Order* at issue here — never became final and non-appealable. Not only had AT&T promptly filed a petition for judicial review of the *Termination Order* (insofar as it had terminated the relevant proceeding), but also the Bureau, recognizing that an unresolved petition for reconsideration was still pending before the Commission at the time of the termination, reinstated the proceeding in an order adopted and released ***prior to the expiration of the 60-day Hobbs Act appeal period***. *See Termination of Stale or Moot Docketed Proceedings*, Erratum, 17 FCC Rcd 4543 (2002) (adopted Mar. 8, 2002; rel. Mar. 12, 2002) ("Erratum"). Because AT&T had filed a timely appeal, and because the Bureau had reinstated the proceeding at issue within the 60-day appeal period, the reinstatement had complied with the *Albertson* rule.[2] The court's ruling in *AT&T v. FCC* therefore bears not at all on the only question before the Bureau here — namely, whether the Commission may lawfully reinstate a

[2] That AT&T was alert enough to appeal the erroneous termination of the proceeding at issue, and that the Bureau was able to correct the error within the 60-day appeal period, not only demonstrates the wisdom and workability of the *Albertson* rule, but also accentuates both the negligent failure of WorldCom and AT&T to file a timely challenge to the termination at issue here and the Bureau's failure to reinstate CC Docket No. 94-157 in a similarly timely fashion.

terminated proceeding where the termination has already become final and non-appealable — that is, where no party has sought administrative or judicial review, and where the time for both reconsideration and appeal has expired. The answer to *that* question, as *Albertson* and its progeny make clear, remains no.

2. That principle applies with added force to a § 204 proceeding, for once the time for reconsideration and judicial review have expired the preconditions for a refund remedy (suspension and an accounting order) are permanently dissolved as well. At that point, the Commission may investigate the tariff at issue only under § 205, which limits the agency to purely prospective remedies.

WorldCom and AT&T insist, however, that nothing in §§ 204 or 205 "prohibit the Commission from exercising its general error-correction authority." Opp. at 17. That assertion merely begs the question whether the Commission in fact has any "error-correction authority" in circumstances where the supposed error was made in an order that has long ago become final and non-appealable and where the "correction" requires a substantive rather than merely a typographical change. As we have shown, the Commission's "general" authority does not apply in these circumstances. Our point here is that the suspension and accounting order that typically precede a § 204 investigation — and that are indispensable to the Commission's power to order a refund at the end of such an investigation, *see Illinois Bell Tel. Co. v. FCC*, 966 F.2d 1478 (D.C. Cir. 1992) — necessarily die along with the investigation itself once an order terminating the investigation is no longer subject to reconsideration or judicial review. In that situation, the Commission occupies the same position it would have been in had it never ordered a suspension

in the first place: it may prospectively prescribe a lawful rate under § 205, but it may not impose refunds under § 204.[3]

WorldCom and AT&T claim that "where an agency makes an 'error, the proper remedy is one that puts the parties in the position they would have been in had the error not been made.'" Opp. at 17. But the cases they cite for that proposition (*id.* at 17 n.17) are not at all like this one. They involved agency action on remand from a judicial decision invalidating a prior order, not an agency's *sua sponte* attempt to revive a proceeding long ago terminated in an order that no court had ever reviewed.[4] Those cases were thus merely an application of the established principle that "[a]n agency, like a court, can undo what [was] wrongfully done by virtue of its [judicially invalidated] order." *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965). They do not remotely support the theory that the Commission may, on its own motion, breathe life into a proceeding terminated more than a year earlier in a final, unappealed order.

According to WorldCom and AT&T, "the *Termination Order* is not an 'order concluding the hearing' within the meaning of Section 204(b)." Opp. at 18. But the plain terms of the order leave no doubt that the tariff investigations consolidated in CC Docket No. 94-157 were

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[3] Nothing in § 4(i) authorizes the Commission to override the limitations of § 204; on the contrary, § 4(i) by its very terms provides only ancillary authority necessary to execute substantive authority provided elsewhere in the Act, and it expressly forecloses action "inconsistent with this Act." *See Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002).

[4] *See Public Utils. Comm'n v. FERC*, 988 F.2d 154, 162 (D.C. Cir. 1993) (upholding "FERC's authority to order retroactive rate adjustments when its earlier order disallowing a rate is reversed on appeal"); *Panhandle Eastern Pipe Line Co. v. FERC*, 907 F.2d 185 (D.C. Cir. 1990) (upholding agency's authority, in wake of prior judicial reversal, to weigh equities in considering whether to grant retroactive relief allowing pipeline to abandon purchases of natural gas); *Office of Consumers' Counsel v. FERC*, 826 F.2d 1136 (D.C. Cir. 1987) (enforcing court's prior mandate by directing agency to remedy statutory violation retroactively back to the date on which finding of violation was made).

"terminated" as of January 11, 2002. *Termination Order*, 17 FCC Rcd 1199, ¶ 2 (2002) ("IT IS ORDERED that the docketed proceedings set forth in the Appendix ARE TERMINATED, effective upon issuance of this order"). The "hearings" in those proceedings were therefore necessarily "concluded" in the most definitive possible way — they were brought to a permanent end. The assertion of WorldCom and AT&T that the hearings were *not* "concluded" amounts only to a claim that the termination was *substantively unlawful*, in the sense that WorldCom or AT&T might have convinced the Commission or a court to set aside the termination if they had sought timely reconsideration or judicial review. But they failed to seek such review, and even a substantively erroneous order carries full legal effect if it goes unchallenged. The termination of CC Docket No. 94-157, regardless of whether it was legally vulnerable at the time it was issued, became final, non-appealable, and in all respects legally effective once the time for reconsideration and judicial review expired.

B. The Commission's Power To Correct Clerical Errors Does Not Extend to Errors Affecting a Party's Substantive Rights

The courts have occasionally upheld an agency's authority to fix clerical or transcription errors in an order when necessary, for example, to conform the terms of an order or certificate to the decision spelled out in the agency's opinion. *See American Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133 (1958); *Howard Sober, Inc. v. ICC*, 628 F.2d 36 (D.C. Cir. 1980). In doing so, the courts have analogized an agency's power to correct such transcription errors to a district court's similar power under Fed. R. Civ. P. 60(a). *Frisco*, 358 U.S. at 145; *Howard Sober*, 628 F.2d at 41. As we demonstrated in the Petition for Reconsideration, however, those cases, like the analogy to Rule 60(a), are limited to "errors of transcription, copying, or calculation," *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 363 (6th Cir. 1990), and do not extend to errors of "judgment or discretion, especially when altering the error affects the

substance of the judgment," *In re American Precision Vibrator Co.*, 863 F.2d 428, 430 (5th Cir. 1989).

WorldCom and AT&T offer three responses. First, refuting an argument no one has made, they declare that Rule 60 applies only to courts, not to administrative agencies. Opp. at 13. But Verizon's point obviously is not that Rule 60 binds the Commission. It is only that the analogy to Rule 60(a), on which some courts have relied in upholding an agency's correction of transcription errors, cannot logically be expanded beyond the reach of Rule 60(a) itself, and that errors of "judgment or discretion," which are governed by Rule 60(b), may be corrected only while the case remains alive (that is, before the time for reconsideration and appeal has expired). WorldCom and AT&T cannot coherently embrace the analogy to Rule 60(a), *see* Opp. at 14, while ignoring the limits that courts have imposed on the use of that rule.[5]

Second, again shadowboxing a phantom opponent, WorldCom and AT&T argue that Rule 60(a) permits the correction of errors "even more than one year following the initial error." Opp. at 13-14. That is self-evidently true: the rule permits courts to correct genuine "clerical mistakes" "at any time." But the pivotal question is whether the supposed error in the *Termination Order* can be equated to a "clerical mistake" under Rule 60(a) or must be considered an error resulting from "mistake, inadvertence, surprise, or excusable neglect" as in Rule 60(b). As we demonstrated in the Petition for Reconsideration (at 8-11), if the termination

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[5] WorldCom and AT&T analogize the Bureau's reinstatement of CC Docket No. 94-157 to a district court's authority "to issue *nunc pro tunc* orders to correct errors retroactively." Opp. at 17 n.16. As the very case they cite reveals, however, a court "may issue *nunc pro tunc* orders 'to show what was actually done but not properly or adequately recorded'" — in other words, to correct only errors of transcription. *Transamerica Ins. Co. v. South*, 975 F.2d 321, 325 (7th Cir. 1992). But a court "may *not* make substantive changes affecting parties' rights *nunc pro tunc*." *Id.* (emphasis added). A court's authority to issue *nunc pro tunc* orders thus reflects the same distinction embodied in Fed. R. Civ. P. 60(a) and (b). Here, of course, the Bureau's *Reinstatement Order* indisputably makes a "substantive change" directly affecting the "parties' rights."

of CC Docket No. 94-157 was erroneous, the error was the product of neglect, confusion, or simple mistake of fact — precisely the kinds of substantive errors that can be corrected, if at all, only under Rule 60(b).

Third, WorldCom and AT&T assert that "an error of this type — erroneously listing a proceeding that clearly does not fit the description of the listed proceedings — is a quintessential 'clerical' error." Opp. at 14. They further claim that "[t]he substantive/procedural distinction drawn by Verizon has no applicability to Rule 60," because "error correction under Rule 60(a) often affects the substantive rights of parties." *Id.* But they do not and cannot deny that the courts have drawn precisely the distinction that they claim does not exist. And though they strain to fit this case within the category of transcription errors — claiming that "a staff member . . . simply goofed" and that the Commission "simply signed off on a list it assumed had been compiled correctly" (Opp. at 15-16 n.14) — their very description of the claimed error confirms that it was the product of "judgment or discretion." This is not a situation in which someone simply transcribed the wrong docket number.[6] Rather, whoever examined the docket at issue made a conscious judgment to include it within those that should be terminated. Even if that judgment was wrong at the time it was made, the resulting order nonetheless correctly embodied that allegedly mistaken judgment, and any corrective action at this time would plainly alter the

[6] An example of *that* kind of error can be seen in footnote 49 of the *Reinstatement Order*. Referring to the rulemaking proceeding that the Commission had mistakenly terminated in the *Termination Order* and that the Bureau had thereafter reinstated before the order became final and non-appealable, the Bureau cited it as "CC Docket No. 96-198," when in fact the proceeding at issue was CC Docket No. 96-187. *See* Erratum, ¶ 4 ("reinstat[ing] to pending status CC Dockets Nos. 98-108 and 96-187"). That is a paradigm example of a genuine "clerical mistake" that may be corrected at any time without affecting any party's substantive rights.

substance of the judgment.[7] As SBC aptly explains in its Reply Comments, characterizing the error at issue here as "clerical" would produce a limitless rule that would allow the Commission to treat *any* staff error as clerical, regardless of whether it involved a mere typographical blunder or a mistaken exercise of substantive judgment. SBC Reply at 3-4.

C. The Termination of CC Docket No. 94-157 Necessarily Concluded All Tariff Investigations Consolidated in That Docket

WorldCom and AT&T implausibly assert that the termination of CC Docket No. 94-157 left wholly untouched the two other OPEB investigations (Docket Nos. 93-193 and 94-65) that the Commission had expressly consolidated in Docket No. 94-157. Opp. at 18. When several separate dockets are consolidated for investigation in a specified docket, an order terminating the investigation necessarily terminates the investigation in all the consolidated dockets unless the Commission expresses a contrary intention. That is what happened here.

It is of no consequence that the Commission's orders often list in their caption every consolidated docket. *See* Opp. at 18. So long as the Commission has made clear that a particular docket embraces a series of consolidated dockets, an order in that docket must be understood to

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[7] The situation here is therefore akin to drawing a property line in a way that inadvertently gives one party 18 acres of land that should have gone to the other party. *See Jones v. Anderson-Tully Co.*, 722 F.2d 211, 212-13 (5th Cir. 1984) (holding that the error could not be classified as a clerical mistake under Rule 60(a) and could not be corrected under Rule 60(b) because too much time had passed). By contrast, the error in *Howard Sober*, a case on which WorldCom and AT&T inappropriately rely, was a classic example of a clerical mistake. The court there upheld the ICC's correction of an operating certificate to include a restriction that the agency had already imposed in its original decision but had "failed to include on the certificate due to a ministerial error." *See* 628 F.2d at 41. In other words, *Howard Sober* was not a case in which the certificate had faithfully recorded a mistaken underlying determination; rather, the certificate had mistakenly *failed* to record a *correct* underlying determination. That is precisely the same distinction drawn in the treatise to which WorldCom and AT&T refer. Opp. at 14 (citing Wright, Miller & Cooper § 2854). Because the *Termination Order* at issue here *did* faithfully record what the Bureau now believes was an erroneous underlying determination — that no further action was required in CC Docket No. 94-157 — it cannot be placed in the category of purely clerical errors.

apply to the consolidated dockets as well, at least in the absence of some specific indication to the contrary. And here the consolidation is beyond doubt. As the *Reinstatement Order* acknowledged, "the Bureau consolidated the . . . three separate pending investigations of exogenous claims . . . into a single proceeding, designating CC Docket No. 94-157 as the docket number for this investigation." *Reinstatement Order* ¶ 14 (citing *Combined OPEB Investigations Order*, 10 FCC Rcd 11804, ¶ 32 (1995)). In 1997, moreover, the Commission resolved all issues in CC Docket No. 93-193 except for OPEB and Add-Back issues, and it terminated that investigation with respect to the resolved issues. *1993 Annual Access Tariff Filings GSF Order Compliance Filings, 1994 Annual Access Tariff Filings, 1995 Annual Access Tariff Filings, 1996 Annual Access Tariff Filings*, 12 FCC Rcd 6277, ¶¶ 2, 113 (1997). The order further stated that the OPEB issues would be addressed in the consolidated investigation in CC Docket No. 94-157. *Id.* ¶ 2 n.6; *see also Reinstatement Order* ¶ 19 n.56.[8] It follows that, by terminating CC Docket No. 94-157 without any indication that previously consolidated dockets were to be treated differently, the *Termination Order* brought an end to all of these consolidated OPEB investigations. There was no need for the Commission to take the redundant step of listing separately each of the individual proceedings that had been previously consolidated in Docket 94-157.

CONCLUSION

For the reasons stated in the Petition for Reconsideration and in this Reply, the Bureau should set aside the *Reinstatement Order*.

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[8] It is therefore beside the point that the OPEB issue in the *1996 Annual Access Tariff Filing* proceeding was initially consolidated in CC Docket No. 93-193. *See* Opp. at 18. Because the OPEB issues in 93-193 had already been consolidated into 94-157, consolidating the 1996 OPEB issue into 93-193 had the effect of consolidating the issue into 94-157. And the 1997 order cited above, which makes clear that the OPEB issues in 93-193 would be addressed in 94-157, confirms that the Commission itself fully understood that fact.

Respectfully submitted,

JOSEPH DIBELLA
VERIZON
1515 North Courthouse Road
Suite 500
Arlington, Virginia 22201

Tel. (703) 351-3037
Fax (703) 351-3676

MICHAEL E. GLOVER
EDWARD SHAKIN
OF COUNSEL

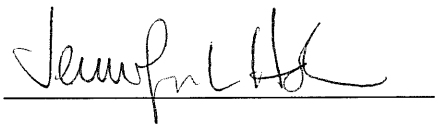
MARK L. EVANS
EUGENE M. PAIGE
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, NW
Suite 400
Washington, D.C. 20036

(202) 326-7900

April 17, 2003

CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of April, 2003, copies of the foregoing "Reply in Support of Petition for Reconsideration" were sent by first class mail, postage prepaid, to the parties listed below.



Jennifer L. Hoh
703-351-3063

William Maher*
Chief, Wireline Competition Bureau

Tamara Preiss*
Chief, Pricing Policy Division

Jeff Dygert*
Deputy Division Chief, Pricing Policy Division

Judy Nitsche*
Assistant Division Chief, Pricing Policy Division

Qualex*

Alan Buzacott
WorldCom
1133 19th St. NW
Washington, DC 20036

Mark C. Rosenblum
Lawrence J. Lafaro
Judy Sello
AT&T
Room 3A229
One AT&T Way
Bedminster, NJ 07921

David L. Lawson
Virginia Seitz
Counsel for AT&T
Sidley Austin Brown & Wood L.L.P.
1501 K St. N.W.
Washington, DC 20005

Davida Grant
Gary Phillips
Paul Mancini
SBC Communications 1401 Eye Street, NW
Suite 400
Washington, DC 20005